

Application No. 10/669,287  
Amendment dated December 08, 2006  
Reply to Office Action of June 16, 2006

RECEIVED  
CENTRAL FAX CENTER

DEC 08 2006

**REMARKS**

Applicant amended claim 1 to further define Applicant's invention.

In the Office Action, the Examiner rejected claims 1-96 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

Regarding the rejection of claims 1-96 under 35 U.S.C. § 112, first paragraph, the Examiner indicates that "the specification fails to disclose an implant with upper and lower members having arcuate portions that in the first position are angled to one another over a majority of the length of the implant as recited in independent claim 1."

In response to the Examiner's rejection under 35 U.S.C. § 112, first paragraph, note that the specification and figures provide support for at least one embodiment of the push-in interbody spinal fusion implant of the present invention having an upper member having a portion being at least in part arcuate and a lower member having a portion being at least in part arcuate where "said arcuate portions of said upper and lower members in the first position being angled to one another over a majority of the longitudinal length of said implant and forming at least a portion of one of a frusto-conical shape and the shape of a cylinder split along a horizontal plane through its mid-longitudinal axis" as recited in amended independent claim 1. For example, on page 16 of the specification, Applicant indicates that "preferred embodiments of the present invention illustrated in the attached figures and discussed herein have arcuate portions 104, 108 angled to one another to form at least a portion of a frusto-conical shape along the length of implant 100." (Specification, page 16, lines 13-15). On page 16 of the specification, Applicant also indicates that "alternatively, the arcuate portions may form at least a portion of a shape described as a cylinder split along a horizontal plane through its mid-longitudinal axis with the upper half and the lower half wedged apart by an inclined plane." (Specification, page 16, lines 16-18). Furthermore, with reference to Figs. 4, 6, 7, 12A and 12B generally, and in particular with reference to Fig. 4, Applicant depicts the implant 100 as having an upper member 102 with an upper arcuate portion 104 and a lower member 106 with a lower arcuate portion 108, where

Application No. 10/669,287  
Amendment dated December 08, 2006  
Reply to Office Action of June 16, 2006

the upper and lower arcuate portions 104, 108 in a first position are angled to one another along a majority of the longitudinal length of the implant 100. As such, Applicant submits that the specification and figures support the above-discussed recitation of amended independent claim 1. Consequently, the Examiner's rejection of claims 1-96 under 35 U.S.C. § 112, first paragraph, is deemed to be overcome.

The Examiner rejected claims 1-72, 74-76, and 84-87 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,117,174 to Nolan ("Nolan") in view of U.S. Patent No. 5,785,710 to Michelson ("Michelson '710"). Claim 1, as now amended, recites an implant with upper and lower members having arcuate portions, "said arcuate portions of said upper and lower members in the first position being angled to one another over a majority of the longitudinal length of said implant."

Nolan teaches an implant 10 that in an unexpanded position has surfaces that are parallel to each other along a majority of the length of the implant. (See Nolan, Fig. 11). Neither Nolan nor Michelson '710, whether alone or in proper combination, teach or suggest an implant with upper and lower members having arcuate portions that in the first position are angled to one another over a majority of the length of the implant as recited in independent claim 1 of Applicant's claimed invention. Applicant submits that the rejection of claims 1-72, 74-76, and 84-87 under 35 U.S.C. § 103(a) as being unpatentable over Nolan in view of Michelson '710 has been overcome.

The Examiner rejected claims 73 and 88 under 35 U.S.C. § 103(a) as being unpatentable over Nolan in view of Michelson '710, further in view of U.S. patent No. 4,961,740 to Ray et al.; and rejected claims 77-83 and 89-96 under 35 U.S.C. § 103(a) as being unpatentable over Nolan in view of Michelson '710, further in view of what would be obvious to one of ordinary skill in the art. Applicant submits that the rejections over claims 73, 77-83, and 88-96 are rendered moot at least because they depend from an allowable independent claim, or claims dependent therefrom.

Applicant submits that independent claim 1 is patentable and that dependent claims 2-96 dependent from independent claim 1, or claims dependent therefrom, are

Application No. 10/669,287  
Amendment dated December 08, 2006  
Reply to Office Action of June 16, 2006

patentable at least due to their dependency from an allowable independent claim.

Applicant respectfully requests that this Amendment under 37. C.F.R. § 1.116 be entered by the Examiner. Applicant submits that the entry of the amendment would place the application in better form for appeal regarding the Examiner's above-listed rejections under 35 U.S.C. § 103(a).

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-3726.

Respectfully submitted,

MARTIN & FERRARO, LLP

Dated: December 8, 2006

By:   
Thomas H. Martin  
Registration No. 34,383

1557 Lake O'Pines Street, NE  
Hartville, Ohio 44632  
Telephone: (330) 877-0700  
Facsimile: (330) 877-2030